189 (3)

No. 10-1274

Supreme Court, U.S.
FILED
JUN 27 2011
OFFICE OF THE CLERK

In the

Supreme Court of the United States

MARIAN K. AGNEW,

Petitioner,

v.

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari To the Supreme Court of the State of Virginia

PETITION FOR A REHEARING

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Petitioner, Marian K. Agnew, seeks rehearing of this Court's May 31, 2011, Order Denying her Petition for a Writ of Certiorari pursuant to Rule 44.2 of the Supreme Court Rules.[1] Rehearing and a grant of certiorari are warranted in light of other substantial grounds not previously presented.

INTRODUCTION

Mrs. Agnew's certiorari petition argued that the Virginia Statute of Limitations ("the Statute") for adverse possession[2] empowered the Circuit Court to summarily decide, without taking her evidence, that her property had been conveyed to the Respondent eight years before she purchased it, fifteen-years after the Respondent had obtained permission from her predecessor to build a Brick Wall between their properties on his (now Mrs. Agnew's) property by deliberately misrepresenting the location of the common boundary line. She asserts here that the equal protection and substantive due process mandates of the 14th Amendment supersede and void not only the Virginia Statute but also similar vague and

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[1] Under Rule 44.2, this Petition for Rehearing is timely.

[2] Virginia Code § 8.01-236. Limitation of entry on or action for land. No person shall make an entry on, or bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have first accrued to such person or to some other person through whom he claims;

ambiguous statutes in other States that mechanically convey titled property to similar squatters.

In support, she submits additional economic studies showing that these mechanical statutes that violate equal protection also increase the negative economic impact of adverse possession on prospective economic development within each State. They have created unequal risks and costs for property owners by both escalating the cost of repelling squatters and destabilizing conventional real property conveyances, precisely the discrimination that the equal protection of the 14th Amendment was designed to prevent.

As urban land values have skyrocketed, economists have been consulted to examine whether the time-honored practice of adverse possession has become a risky and costly threat to expectations of profit; or is still the least expensive and expedient way to settle title disputes. To assess those risks and costs, several economic studies have evaluated alternative lengths for state statutes of limitation ("Statutes).[3] Although the study examined below[4] does not reach the ultimate conclusion that all such statutes are obsolete, irrationally related to economic

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3 Baker, Miceli, Sirmans, Turnbull, *Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes*, Economic Development Quarterly, August, 2001, 360-370.

[4] Papageorgiou, Turnbull, *Economic Development and Property Rights: Time Limits on Land Ownership*, Economic Development Quarterly, August 2005, 271-283.

needs and inherently discriminatory, its analysis suggests that the uniform length of all state Statutes since enacted in the 18th Century, remains a major deterrent to maximizing profit from land development today.[5]

A. Anachronistic, Arbitrary, Vague and Ambiguous, One-Size-Fits-All-Time-Lapse State Statutes of Limitation for Adverse Possession Generate Unequal Risks and Costs Negatively Affecting Economic Development.

Adverse possession, also called "theft by squatters," is state action that prohibits a property owner from ejecting a trespasser upon tolling of the Statute, thereby taking his property without compensation. Addressing its invisible operation on property values, economists here evaluate the notion that the length of the Statutes has destabilized property values for both urban and rural property owners from past and future squatter's claims, thereby failing to accommodate landowners' expectations of profitability. "Well-defined property rights enhance efficiency and liquidity in asset markets, thereby promoting efficient economic development."

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[5] The study does not address "tacking," the practice of computing statutory ownership by consecutive possession of property.

"Conflicting ownership claims profoundly affect the pace and pattern of economic investment." "The Statutes of Limitation establish a time limit to challenge, or protect from challenge, an individual's claim of ownership." Since the life span of land exceeds that of any individual, investors want to know how long claims against property title should be honored. "In the 18th Century, when these statutes were imported from English law, state legislatures responded to the economic demands of owners of developed or developable land to enact shorter or longer statute lengths. Political power in the agricultural, forestry, and other nonurban sectors of the economy produced a longer prevailing statute of limitations. In urbanized sectors, prevailing statutes on claims to land title are shorter."

> "In the United States, for example, changes in the state statutes have been few and infrequent even though the nation has enjoyed a rapid rate of technological growth and unprecedented change in its economy over the past 85 years. [Earlier economic studies] identify only nine U.S. states that have changed their statute lengths from 1916 to 1999."

Generally, the longer statutes of original colonies reflect rural interests and those with shorter statutes were enacted as states were admitted to the Union. Statutes enacted later attempt to ascertain proof of honest possession, primarily by color of title and

proof of tax payments. They vary from sixty (60) years in New Jersey to two (2) years in Arizona. The Texas statute is three (3) to fifteen (15) years, depending upon circumstances. Hawaii, a land court registration state that invalidates adverse possession claims, is twenty (20).

Economic analyses also reveal that it is not possible to impose a uniform statute length without arbitrarily redistributing wealth from one sector to another:

> "Owners of land in central cities or older suburbs benefit from a shorter statute length, whereas owners of land farther out toward the fringe of urban areas benefit from a longer statute. Therefore, the single statute length within an economically diverse state cannot fulfill the needs of all types of property owners at all times."

The study suggests that statute length affects the profitability for redevelopment of declining urban cores in U.S. cities, like the Washington Metropolitan Area. There, a significant part of the economic development process is tied to shifting land from agricultural, forestry, or other nonurban uses to the urban sector or the transfer of land from one urban use, single family lots, to another more highly valued use, townhouses, apartments, or shopping centers. Presumptively, the bare-bones Virginia Statute chal-

lenged here is original because it protects owners of record from squatters in possession by limiting their eviction "right of entry," to fifteen years. Both Maryland and the District impose stricter restrictions on adverse possession takings, notably proof of tax payment.

The study also shows that the length of the Virginia, D.C., and Maryland Statutes does not maximize value for land in the interior of an urban area. It predicts that those statutes should be shorter than statutes for land peripherally further away because of rental value.

> "For any two different parcels of land, the land with the larger future net rent [should have] a shorter optimal statute of limitations than [should] land with a smaller future net rent." "economically pressed areas of metropolitan regions in the United States cannot generally expect to enjoy the statute lengths that would most enhance the market value of redeveloped property."

The study also predicts that changing a state statute of limitations, will yield a capricious reallocation of wealth in the form of capital gains and losses among property owners, as the values of their property adjust to the new statute length.

> "The difficulty here is that frequent changes create uncertainty about the future course of the property rights with the ensuing effect of slowing economic development. Even giving the power of setting the statute to local governments can lead to frequent changes that, regardless of motivation, create property rights uncertainty, even for a developed country like the United States." Therefore, an effective property rights regime requires that any fundamental changes in the nature or definition of those rights be infrequent."
>
> "Easing transitions from one statute length to another using "hold harmless" or grandfather clauses may not ensure that such transitional periods are efficient." "Recent studies by Innes (1997) and Turnbull (2002) are suggestive on this point; they show how uncertainty in the exercise of eminent domain or land-use regulations by local governments can lead to inefficient investment in capital improvements and development timing, even when property owners are protected by transitional compensation schemes."

(*See for example*) (*Penn Central Transp. Co. v. New York City*, 438 US 104 (1978) (eminent domain).

The study concludes that no statute length will have equal benefits for all property owners: "No single special-purpose modification of property rights for

developing urban land will suit all neighborhoods in need of redevelopment." All state Statutes of Limitation have unequal risks and rewards, failing to provide protection for owners of various kinds of property. Even if localized,

> "The main implication. . . of the study is that, even at the city or county level, a given statute of limitations cannot fully meet the needs of all of the various types of property contained within the jurisdiction." "There is, therefore, no way to determine the optimal length of a statute that did not prejudice owners of various kinds of land."

All property owners are at put at risk because, applied statewide, the Statutes are irrationally discriminatory. Put simply no uniform state Statute of Limitations can provide equal protection required by the 14th Amendment.

B. State Statutes of Limitation Demand Constitutional Review Because They Are Obviously Arbitrary and Patently Without Rational Relationship To Current Commercial Real Property Development.

This Court in *McGowan v. Maryland*, 366 U.S. 420 (1961), mirrored in this case on all fours, examined state statutory restrictions on Sunday sales, "Sunday closing laws," were also imported from Eng-

lish common law in the 18th Century. Originally intended to establish both religious observance and a day of rest by restricting Sunday commercial activity, they remained as labor regulation long after their religious restrictions were disestablished by the First Amendment. Business interests have challenged their allegedly unfair impact on local commerce on 14th Amendment equal protection and due process grounds for many years.

Even though these Maryland Sunday laws were not verbatim re-enactments of their religiously oriented antecedents, "legislation in forty-nine of the fifty States still illegalized on Sunday some form of conduct lawful if performed on weekdays," *McGowan*, Id. at 449, 496, In several States only one or a few activities were banned—the sale of alcoholic beverages, hunting, barbering, pawn brokering, trading in automobiles; but thirty-four jurisdictions broadly banned Sunday labor, selling or keeping open for sale, etc. *McGowan*, Id. at 495-496. "Throughout the years, state legislatures had modified, deleted from and added to their Sunday statutes." McGowan, Id. at 435.

By contrast, the vague Virginia Statute that initiates adverse possession but never refers to it, has presumptively remained essentially unchanged since its enactment. (*see* fn. no. 2) Its provisions lack all rational foundation because they are not related to citizen needs for stable and predictable land owner-

ship. In fact, they create conflict between the putative owner and the claimant, as shown in this case. The Statute simply precludes "no person," including the owner of record, from "entry upon land" to "bring an action to recover" after fifteen years. It clearly does not meet the standards set by the *McGowan* Court for constitutionally permissible state regulation of commercial activity.

> "The Constitution is satisfied if a legislature responds to the practical living facts with which it deals." "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 "It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. See *Goesaert* v. *Cleary*, 335 U. S. 464. And what degree of uniformity reason demands of a statute is, of course, a function of the complexity of the needs which the statute seeks to accommodate." McGowan, Id. at 524.

It is clear that in fashioning legislative remedies to fit specific needs, "The range of the State's discretion is large." *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 501

> "This is especially so where, by the nature of its subject, regulation must take account of traditional and prevailing local customs.

> See *Kotch v. Board of River Port Pilot Comm'rs*, 330 U. S. 552.. " "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical, Inc.*, 348 U. S. 483, 489.

> The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary; and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of lack of rationality. McGowan, Id. at 534, 535

The *McGowan* Court held that Sunday statutes were constitutional: "As expressions of state policy, they must be deemed as contemporary as their latest-enacted exceptions in favor of moving pictures or severer bans of Sunday motor vehicle trading" They reflected a widely felt present-day need related to local circumstances. "The notion that. . . the Mary-

land statute lacks all rational foundation is baseless. The exceptions relate to products and services . . . reasonably necessary to the physical and mental health of the people or to their recreation and relaxation on a day of repose. *McGowan,* Id. at 537.

This Court must find that uniform state statutes cannot possibly meet the McGowan standards primarily because they have no schemes of classification. They are obviously arbitrary and discriminatory, so patently without reason that no conceivable situation of fact can be found to justify them. They do not reasonably protect property owners' needs, "a peculiar and changing set of local circumstances and local traditions." They are irrationally arbitrary, applying indiscriminately to both urban and rural land, simply transferring ownership to possessors when they expire. The statutes are, therefore, patently incapable of any justification whatsoever rationally to determine property ownership because they subvert conventional conveyancing and recording procedure and in so doing, create unstable expectations of profitibility in land transactions.

The McGowan analysis clearly demonstrates that, like all other state Statutes of Limitation conveying millions of dollars worth of property by adverse possession without compensation every year, the Virginia Statute of Limitations must be given at least the same constitutional scrutiny accorded the

McGowan Maryland defendants who were fined $5.00 for selling notebooks and staplers on Sunday.

C. All Statutes of Limitation Must Be Declared Unconstitutional Because They Destabilize Property Law.

Both the vestigial 18th Century Virginia Statute of Limitation for Adverse Possession and the Maryland Sunday closing statutes share common origins in English common law. However, the Maryland statutes passed constitutional scrutiny because they had a rational foundation, "providing exceptions relating to products and services which a legislature could reasonably find necessary to the physical and mental health of the people or to their recreation and relaxation on a day of repose." *McGowan,* Id. at 536.

As shown by the economic study reviewed above, there is no such rational basis for the economic destabilizing effect of the statutes of limitation for adverse possession that have failed since their enactment to acknowledge the development/property-rights nexus between time limitations and pressing ownership claims for land. The Statutes should have been repealed soon after the 14th Amendment was ratified in 1868, as were the restraints on religious practice when Virginia legislators repealed all laws deemed inconsistent with the Bill for Establishing Religious Freedom as "a true exposition of the principles of the Bill of Rights and Constitution." (Nota-

bly, "The Sunday law of 1786 [preventing labor on Sunday] was not among those repealed." *McGowan*, Id. at 495.)

That omission now demands constitutional review. The economists ask, "Why not allow local governments to obtain special exclusions for land within their jurisdictions?" There has been some limited experimentation in the United States with local variation in property rights regimes. For example, a handful of locales have employed 'registration' title rules instead of the more common 'recording' rules used throughout most of the United States. The relevant difference between these two title systems is that the registration system in effect eliminates the risk of many prior claims as well as those of potential future squatters. This use of the registration title represents a local variation in the state's statute of limitations for exercising such claims. "Although limited, the U.S. experience suggests that local variations in the statute of limitations (perhaps at the county level) are feasible."

CONCLUSION

Your Petitioner respectfully requests review of her Petition for Rehearing that presents economic grounds not previously presented for remand, reversal and repeal of not only the Virginia Statute but also all other state Statutes of Limitation for adverse possession that fail to protect property rights equally

by providing the substantive due process mandated by the 14th Amendment to the U.S. Constitution.

Respectfully Submitted,

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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

Marian K. Agnew